not employ himself in carrying out his duties in respect of which he receives payment. Alternatively, the remuneration which he receives is profit from property in the sense of his right to a payment of money.

For the reasons I have stated the Board of Review, in my opinion, were quite right in dismissing the appeal. I would therefore dismiss this appeal with costs.

Appeal dismissed.

TAN SIEW ENG & ORS. v. CHANG KUI MOI & ORS.

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) & Pike C.J. (Borneo)) June 13, 1967]

[Kuching — Federal Court Civil Appeal No. X. 3 of 1967]

Landlord and Tenant — Sub-tenancy — Sub-lease — Assignment by sub-tenant — No permission of landlord — Land Code (Sarawak Cap. 81), ss. 119 & 161 — Rent Control Ordinance (Cap. 86) s. 5.

Practice and Procedure — Decisions on preliminary points of law — Tendency of counsel to request or agree to hearing.

PL was a sub-tenant of the 1st appellant and had occupied the premises in question for some 16 years. The ownership of the building of which *PL's* premises formed part changed hands and the new owner wished to have vacant possession of the ground floor and to this end negotiated with *PL* to obtain vacant possession by the end of 1965. This *PL* agreed to do for a consideration of $12,500 and this was achieved by what had been described as an assignment of his monthly tenancy.

The only issue before the High Court was: "Was the assignment of *PL's* sub-tenancy valid without consent?" and the learned judge found on the evidence that *PL* never contracted or promised or agreed not to sub-let or assign without prior agreement of the 1st appellant, consequently no express consent of the 1st appellant was necessary to make valid *PL's* agreement to assign for value his interest to the respondent on the ground that the tenancy was a monthly one. He also held that the transfer was not illegal or invalid by reason of its non-registration under section 119 of the Land Code or by reason or section 5 of the Control of Rent Ordinance. On appeal,

Held (Pike C.J. (Borneo) dissenting): (1) since the Land Code specially exempted a sub-lease or an agreement for a sub-lease for a period not exceeding a year, from registration, it is only a sensible interpretation of the intention of the legislature that a dealing in reference to such a lease or agreement for a lease should also be exempted. The reason for exempting a sub-lease or an agreement for a sub-lease for a term not exceeding a year from registration is for the convenience of the people. It follows therefore, for the convenience of the people the law should be interpreted so that an assignment or dealing with such a sub-lease should also be exempted from registration;

(2) in the circumstances of the case although the respondent paid the sum of money to *PL*, that itself, did not disable him from asserting his right which he had under the sub-tenancy.

Cases referred to:—

(1) *Rajbenback* v. *Mamon* [1955] 1 Q.B. 283.

(2) *Tay Thean Poh* v. *Ng Gek Ing* Kuching High Court Case No. A/17/59.

(3) *Bong Kam San* v. *Tan Cheng Chuan* unreported Kuching High Court case.

(4) *R.* v. *Tonbridge Overseers* (1884), 13 Q.B.D. 339, 342.

(5) *Grace Rymer Investment Ltd.* v. *Waite & Ors.* [1958] 1 All E.R. 145.

(6) *Anthony Tan & Anor.* v. *Yong Foh Phin & Anor.* [1960-63] S.C.R. 77.

(7) *Eusof bin Ali & Anor.* v. *Nyonya Lee Gaik Hooi* [1953] M.L.J. 98.

FEDERAL COURT.

S. K. T. Yong for the appellants.

K. H. Ong for the respondents.

Cur. Adv. Vult.

Barakbah L.P.: I have had the advantage of reading the judgments of Azmi, Chief Justice, Malaya and Pike, Chief Justice, Borneo. With due respect I agree with the views expressed by the former, but by a different course of reasoning.

The main grounds of appeal are:—

(a) that under the law of Sarawak an assignment of an interest in land cannot be by parol and that the instrument Ex. 12 if it is to be regarded as an instrument of assignment is, under section 119 of the Land Code, ineffectual because unregistered; and

(b) that the transaction of assignment is unenforceable because tainted with illegality.

With regard to ground (a) the relevant sections of the Sarawak Land Code applicable are sections 119(1), 137(1), 139(1), 158 and 161. They read as follows:—

"119. (1) No instrument shall be effectual to pass any land or any interest therein, or render any land liable as security for the payment of money, until it has been registered in accordance with this Part.

137. (1) When any land or any estate or interest therein is intended to be transferred, the transferor and transferee shall execute for the purpose of registration a memorandum of transfer in Form G in the First Schedule, which memorandum shall give such description of the land as may be necessary, shall refer to the entry in the Register relating thereto and shall contain a precise statement of the estate or interest intended to be transferred. Every transfer shall be subject to the provisions of section 31.

139. (1) A registered charge or sub-lease may be transferred by a memorandum of transfer in Form G in the First Schedule.

158. When any land is intended to be sub-leased for any term exceeding one year, the proprietor and the sub-lessee shall execute for the purpose of registration a memorandum of sub-lease in Form L in the First Schedule, which memorandum shall give such description of the land as may be necessary to identify the same and shall refer to any entry in the Register relating thereto. Any such sub-lease may also include an agreement by the sub-lessee that he will insure and keep the property insured against loss or damages by fire and also such other conditions as may have been agreed to by the parties.

161. Any sub-lease, or agreement for a sub-lease,

granted for a term not exceeding one year shall be valid without registration, and every registered dealing with the land shall be subject to the rights of a tenant in possession under a prior sub-lease or agreement for a sub-lease for a term not exceeding one year."

In my opinion, however, all that need be considered in this case is section 161 by itself. What was assigned was a monthly tenancy which is valid without registration. Indeed a monthly tenancy is incapable of registration by virtue of section 158. Since a monthly tenancy, which is the parent, can subsist without registration, it follows that an assignment or transfer of a non-registrable interest, which is the offspring, is thus incapable of registration. Hence the argument by counsel for the appellant results in an absurdity if no transfer can be valid except by registration of an instrument. In effect then, monthly tenancies would become unassignable, which is contrary to universal long-established practice, not to say good sence as well.

The answer to the argument on illegality can be found in the case of *Rajbenback* v. *Mamon* [1] where an agreement as in the instant case was held not to be vitiated in any way by the Rent Acts.

I would dismiss the appeal with costs.

Azmi C.J. (Malaya): This is an appeal against the judgment of the High Court at Kuching, granting a declaration in favour of plaintiffs (respondents in this appeal) that they were entitled to possession of the first floor of a shop house known as 159 Padungan Road, Kuching. I will hereafter refer to the ground floor as the premises.

About 16 years ago, the first appellant's husband as the tenant of the shophouse sub-let the premises to one Phang Lin but, when her husband died first appellant became Phang Lin's chief tenant. On or about 12th November 1965, as evidenced by the document referred to as document "12" Phang Lin purported to assign the premises to the first respondent for a consideration of $12,500. The first appellant in this appeal alleged among other things that it was a term of the sub-letting to Phang Lin that the latter was to return the premises to her when Phang Lin should vacate it.

According to the trial judge no evidence was taken on the first day of the trial because both counsel agreed that the facts were as they appeared in the pleadings and bundles of documents. The only one issue was then as follows:—

"Was the assignment of Phang Lin's sub-tenancy valid without consent?"

On the second day, however, the learned judge on second thought, decided to take evidence on another issue namely as to whether Phang Lin had agreed that he was not to transfer his sub-tenancy without the consent of the first appellant.

The learned judge found on the evidence he took that Phang Lin never contracted or promised or agreed not to sub-let or assign without prior agreement of first appellant. He therefore found that no express consent of first appellant was necessary to make valid Phang Lin's agreement to assign for value his interest to the respondent on the ground that the tenancy was a monthly one. He also held that the transfer was not illegal or invalid by reason of its non-registration under section 119 of the Land Code, or by reason of section 5 of the Control of Rent Ordinance.

He therefore gave judgment as prayed by the respondents.

Against that judgment the appellants appealed to this court on the following grounds:—

(1) The learned trial judge ought to have held that the document (letter 12) described by him as a receipt was in fact an instrument within the meaning of the Land Code (Cap. 81) and as it was not registered no interest in land could effectually be passed to the plaintiffs/respondents.

(2) The learned trial judge was wrong in holding that sub-lease could be orally assigned and ought to have held that such an assignment if to be valid should be by deed or in writing.

(3) The learned trial judge failed to make the distinction between a sub-lease by a sub-lessee and an assignment of the sub-lease by him, which has different legal consequences.

(The fourth ground was abandoned before us.)

Before us however, counsel for the appellants also brought up again the question of illegality under section 5 of the Rent Control Ordinance though it was not included in his written grounds of appeal. The questions this court has to decide therefore are as follows:—

(1) Was the assignment of the sub-lease by Phang Lin to respondents good in law notwithstanding the fact that it was not registered under the Land Code?

(2) Was the assignment of the sub-lease illegal and therefore not effective by reason of the payment of the premium as disclosed in document 12 under section 5 of the Rent Control Ordinance.

Section 161 of the Sarawak Land Code provides that a sub-lease or an agreement for a sub-lease granted for a term not exceeding one year shall be valid without registration. It goes further and provides that every subsequent registered dealing with the land shall be subject to the rights of such a tenant in possession.

In the two un-reported appeals before the

High Court in Sarawak, (*Tay Thean Poh* v. *Ng Gek Ing* [2] and *Bong Kam San* v. *Tan Cheng Chuan* [3]) the High Court held that an assignment of a sub-lease being "a disposition of land" within the meaning of section 52 of the Land Settlement Ordinance (since repealed) must be registered but the section, however, exempts from registration a lease for a period of not more than a year.

It is true that if one interprets an assignment as a dispositon or dealing in land, it must be registered like any other dealing to make it legally effective. On the other hand, since the Code specially exempts a sub-lease or an agreement for a sub-lease for a period not exceeding a year, from registration under the Code, would it not be a sensible interpretation of the intention of the legislature that a dealing in reference to such a lease or agreement for a lease should be also exempted?

In my view, the reason for exempting a sub-lease or an agreement for a sub-lease for a term not exceeding a year from registration, is for the convenience of the people. It follows therefore, for the convenience of the people the law should be interpreted so that an assignment or dealing with such a sub-lease should also be exempted from registration. As Brett L.J. said in *R.* v. *Tonbridge Overseers*:—[4]

"If the convenience is not only great but what I may call an absurd inconvenience by reading an enactment in its ordinary sense, whereas if you read it in a manner in which it is capable, though not its ordinary sense there would not be any inconvenience at all: there would be reason why you should not read it according to its ordinary grammatical meaning."

I would therefore say that this ground of appeal must fail.

The second ground of appeal was that the assignment made between the respondents and Phang Lin was tainted with illegality and therefore is not enforceable in law by reason of section 5 of the Rent Control Ordinance (Cap. 86).

Sections 5 and 6 of this Ordinance read as follows:—

"5. No person shall, as a condition of the grant, renewal, transfer or continuance of a tenancy, require the payment of any fine, premium or other like sum or the giving of any other valuable consideration in addition to the rent and any sum or other valuable consideration paid or given in contravention of the provisions of this section shall be recoverable by the person by whom it was made or given.

6. Any person who contravenes the provisions of section 4 or 5 shall be guilty of an offence . . . ."

It was urged therefore the agreement as disclosed in document "12" is illegal because respondent under it paid the premium. In support of that contention paragraph 216 at page 125 *Halsbury's* Laws of England, 3rd Edition Vol. 8 was read to us. At first sight the appellant's contention would appear right but in the course of preparing this judgment I came across *Grace Rymer Investments Ltd.* v. *Waite & Ors.* [5]

Danckwerts J. in that case was of the view that although the payment of rent in advance was in the circumstances a premium unlawfully demanded by the respondent in that suit contrary to the Landlord and Tenant (Rent Control) Act 1949 section 2, that did not render tenancy given to another person invalid.

The learned judge said at page 145:—

"It is clear that it is the act of the landlord which is forbidden and is an offence under these provisions. But the Acts treat the tenant as a victim, as s. 2(6) of the Act of 1949, as well as the following provisions show. Section 2(5) of the Act of 1949 gives the tenant the right to recover the amount of a premium which could not lawfully have been required."

The plaintiffs appealed to the Court of Appeal and the judgment of the Court of Appeal is reported at page 777 [1958] 2 All E.R. I quote the judgment of Lord Evershed M.R. at page 780.

"But since the illegality point, if I may so describe it, is in a sense fundamental to the whole issue, it is perhaps convenient to dispose of that first. If the truth is that the bargain was so tainted with illegality that Mrs. Hitchen cannot rely on it, that would be a conclusion of the whole matter. In my judgment, it clearly was not. The essential section is s. 2 of the Landlord and Tenant (Rent Control) Act, 1949. By s. 2(6) it is enacted that

'A person requiring any premium in contravention of this section shall be liable on summary conviction to a fine.'

Indicating, of course, that it is a criminal offence so to require. The fact that it is illegal to require rather than accept the payment was considered fully by this court in *Woods* v. *Wise* [1955] 1 All E.R. 767 . . . but, assuming for the purposes of the argument that it was a premium, undoubtedly the Waites committed a criminal act in requiring the payment of £315. 18s. as a condition of the grant of the rights of occupation which they promised. It does not, however, follow, in my judgment, that Mrs. Hitchen by paying it was so tainted with the criminality of the Waites as to disable her from setting up her bargain in any form at all."

Later at page 781, the Master of the Rolls went on to say:—

"Therefore, I reject, as did the learned judge, the proposition that Mrs. Hitchen is debarred by participating in a criminal act from asserting any right which she may have under her contract of tenancy."

I am therefore persuaded by the reasoning of the Master of the Rolls and say in the present case that although the respondent paid the sum of money to Phang Lin, that itself, does not disable him from asserting his rights which he has under the sub-tenancy.

I would therefore say that the second ground of appeal must also fail.

The appeal is therefore dismissed with costs.

Pike C.J. (Borneo): This is an appeal against the decision of the High Court in Borneo granting a declaration in favour of the plaintiff

respondents' claim to possession of the ground floor of a shophouse known as No. 159 Padungan Road, Kuching, and ordering two of the three defendant appellants who were in physical possession to quit the premises.

The facts are that the one Phang Lin, who traded under the name of Chop Mui Fah on the ground floor of No. 159 Padungan Road, was a sub-tenant of the 1st defendant Tan Siew Eng and had occupied the premises for some 16 years, first as Tan Siew Eng's husband's tenant and, after he died, as her tenant.

The ownership of the building of which Phang Lin's premises formed part changed hands and the new owner wished to have vacant possession of the ground floor and to this end negotiated with Phan Lin to obtain vacant possession by the end of 1965. This Phang Lin agreed to do for a consideration of $12,500 and this was achieved by what has been described as an assignment of his monthly tenancy. This assignment was either effected or evidenced by the document Ex. 12 which the defendant appellant contends is an instrument within the meaning of the Land Code and which the plaintiff respondent contends is merely a receipt for money and is but evidence of a parol assignment.

The trial before the learned judge proceeded on a preliminary question of law on which counsel agreed that the issue depended for its determination. The question of law framed was "Was assignment of Phang Lin's sub-tenancy valid without consent of defendant 1?".

It was agreed that if the answer to this question was in the affirmative then the plaintiffs should succeed and if in the negative the defendants must succeed.

I pause only to remark on what seems to be a tendency in this court for counsel to request or agree to the hearing of cases being short circuited by decisions on preliminary points of law. This is not always either the quickest or the most certain way of protecting their clients' interests. As will be seen later in this judgment the question posed for decision does not, whatever the answer it receives, necessarily finally dispose of the real issues in this matter. It is usually wiser to establish by evidence what the facts are before attempting to decide, sometimes on ill-drawn pleadings, what the law governing those facts is.

The defendant appellant relies on two main grounds of appeal, namely —

(a) that under the law of Sarawak an assignment of an interest in land cannot be by parol and that the instrument Ex. 12 if it is to be regarded as an instrument of assignment is, under section 119 of the Land Code, ineffectual because unregistered; and

(b) that the transaction of assignment is unenforceable because tainted with illegality.

Dealing first with (a). Counsel for the appellant argues that the document Ex. 12 is an instrument within the meaning of the Land Code. In support of this he refers to section 2 of the Code in which "instrument" is defined as "any printed or written document relating to the transfer of, or other *dealing* with, land, or evidencing title thereto, but does not include a caveat" and to the definition in the same section of "dealing" which is defined as "every transfer, charge, lease or other instrument affecting any estate or interest under this Code".

I set out the terms of Ex. 12:—

"TRANSLATION OF DOCUMENT EXECUTED BY PHANG LIN

C O P Y

This receipt is made on the 12th November, 1965 by me Phang Lin, the proprietor of Chop Mui Fah, carrying on the business of studio, on the ground floor of the shophouse at No. 159 Padungan Road, Kuching.

Now, I am willing to vacate the said shophouse and yield up to Mr. Chang Nga, the shophouse owner for his own use, and it is verbally fixed a sum of $12,500 be paid to Phang Lin, as a compensation for his removing expenses.

Now, I have received a Hock Hua Bank cheque in the sum of $3,000 paid by Mr. Chang Nga in advance. A balance of $9,500 will be settled in full, as soon as not later than the 31st December, 1965.

It is feared that the verbal promises is not safe, therefore writing this receipt and handing it to Mr. Chang as a proof.

The Writer of this receipt:
Phang Lin.
Witnesses:
Chai Kiam.
Pui Chin Ngan.

Paid in full.
A last word written
in Chinese is illegible.
19.12.".

Ex. 12 does, in my opinion, constitute an instrument relating to a dealing with an interest in land under the Code i.e. the assignment or transfer of a sublesee's interest, and it seems to me, therefore, that the document Ex. 12 is an instrument within the meaning of the Land Code. But even if I am wrong the question is not in my opinion and for reasons appearing later in this judgment crucial.

Next counsel points to section 119 of the Code, subsection (1) of which, in very forcible language, declares that "no instrument shall be effectual to pass any land or any interest therein . . . until it has been registered in accordance with this Part" i.e. Part VII of the Code which deals with registration. Subsections (2) and (3) in even more forcible language forbids a court to recognise, assist, enforce or protect as against a registered proprietor or a person claiming through a registered proprietor any claim to the possession, enjoyment or occupation of land or

any interest in land, which is founded upon or arises from any instrument which by reason of subsection (1) is not effectual. Defendant 1 through her counsel claimed to be a person claiming through a registered proprietor, namely as being the head tenant of the whole building of which the ground floor in dispute formed part.

Ex. 12 has not been registered and it seems doubtful whether it can be registered since section 120 of the Code forbids the registration of "any instrument purporting to transfer or otherwise deal with or affect any estate or interest in land under the provisions of this Code, except in the manner therein provided, nor unless that instrument is in accordance with the provisions thereof". An unregistered sublease for a term not exceeding twelve months is, in my opinion, an interest in land under the provisions of the Code because the validity of such an interest is expressly provided for under section 161.

Section 137 requires that when any land or any estate or interest therein is intended to be transferred the transferor and transferee must execute for the purpose of registration a memorandum of transfer in the Form G in the First Schedule to the Code. Reference to that form indicates that a transfer can only be effected by a registered proprietor and this indeed is indicated in the marginal note to section 137; and in the substantive provisions of the similar section 139 (which deals with transfers of subleases and charges) it is provided expressly that a registered charge or sublease may be transferred by memorandum of transfer by means of the same form as that provided for use under section 137. It should be noted that the section does not except the transfer of a sublessee's interest in a sublease from the operation of the section. Compare section 158 which excepts a sublease for less than a year from the mandatory provisions of the section.

Is there on the facts of this case any difference in law between an assignment of an interest in land and a transfer of such an interest? In my opinion there is not, and it follows, therefore, that an assignment by instrument of such an interest must, unless some provision exempting it from compliance can be found, comply with the provisions of the Code if it is to be effectual.

In a country where a system of land registration is in force it is surely to be expected that unless specifically exempted from registration every transaction affecting land under registered title must be registered to be effectual.

Turning now to section 161 one finds express provision for the validity without registration of a sublease or agreement for a sublease for a term not exceeding twelve months but neither in that section nor, so far as I can find, in any other provision of the Code is provision made for the validity without registration of a transfer or assignment of such a sublease. It would have been a simple matter for the Legislature, had it been intended, to have included in section 161 a similar provision in respect of the transfer or assignment of a sublease. Since the only transactions specifically made valid without registration are subleases or agreements for subleases for a term not exceeding twelve months, there sems to me a strong inference that any other type of dealing must, if it is to be effectual and legally enforceable, be registered. That this should be so does not seem to me to be surprising. To allow transfer or assignment without registration or notice of an unregistered interest in land would surely be to place the registered proprietor and persons holding directly under him at a considerable disadvantage. There seems to me some support for this view in the history of the land law of Sarawak. The law in force prior to 1958 when the Land Code came into force was the Land Settlement Ordinance, section 52 of which expressly provided that no disposition of land registered on the new register, other than a sublease for a period of not more than one year, shall be valid unless it has been registered on the register. The Land Code has in section 161 extended validity to agreements for subleases as well as subleases. In a system which provides for registration and even in respect of subleases and agreements for subleases for a period not exceeding twelve months does not preclude registration, when a proprietor (and by definition this includes a person entitled to an unregistered estate or interest) grants an unregistered sublease, it seems not unreasonable to suppose an element of personal selection in the person of the sublessee. To follow that sublessee to transfer or assign his interest in the sublease without consent or even notice to some man of straw would be unfair to the sublessor. In this connection it is to be noted that section 161 provides only for the protection of the rights of a tenant in possession under an unregistered prior sublease for a term not exceeding twelve months as against a registered transferee of the land. The plaintiffs never became tenants in possession.

The view which I have taken of section 119 and the other provisions of the Code considered above seems to be in line with the view which Ainley C.J. took in the case of *Anthony Tan & Anor.* v. *Yong Foh Phin & Anor.*[6] and with the view taken by the learned judges who considered the effect of section 52 of the Land Settlement Ordinance (a provision similar to section 119 of the Land Code) in the Sarawak High Court Civil case of *Bong Kam San* v. *Tan Cheng Chuan* [3] and the unreported case of *Tay Thean Poh* v. *Ng Gek Ing.*[2]

The plaintiff respondents relied strongly on the case of *Eusof Ali & Anor.* v. *Nyonya Lee Gaik Hooi* [7] in which it was held that a parol monthly tenancy could be legally assigned. That case

was decided on facts which are quite different and on the law then in force in the State of Kedah. It does not appear from the judgment that the learned judge in that case considered the provisions of the Land Code, Cap. 138 of the Laws of the Federated Malay States which are similar to sections 119 and 161 of the Land Code of Sarawak. I refer to sections 96, 118 and 125 of that Land Code. Nor is there any definition of "instrument" in that Code such as is found in the Sarawak Land Code. Nor does the Malayan Land Code contain a section in such wide terms as section 137 which deals with transfers not only of land but of any estate or interest in land. Section 110 of the Malayan Land Code is limited to the transfer of land and land is not defined to include any estate or interest therein. In my opinion, therefore, the law of Sarawak as contained in the Land Code differs in material respects from the law in force in Kedah when the *Eusof Ali* case was decided and this case must be decided on the law as I find it in Sarawak.

I would, accordingly, hold that the assignment, whether it be regarded as having been effected by parol agreement or by the instrument Ex. 12 was ineffectual to transfer Phang Lin's interest in the land to the plaintiff respondents because it was not registered.

The view which I have taken of the matters dealt with above make it unnecessary for me to come to any conclusion as to the appellants' second ground of appeal and I refrain from doing so.

For the above reasons I would allow this appeal and would order that the respondents do pay the costs in this court and in the court below.

Appeal dismissed.

TAN THYE SENG & ANOR. v. PUBLIC PROSECUTOR
PUBLIC PROSECUTOR v. TAN HEAN SENG

[A.Cr.J. (Ong Hock Sim J.) June 15, 1967]

[Penang — Criminal Appeal No. 32 of 1967]

Penal Code ss. 392 & 397 — Robbery — Armed with deadly weapons — Charge — Framing — Consolidation of charges.

Three accused were charged with offences under sections 392 & 397 of the Penal Code. The charge read *inter alia* "and at the time of committing the robbery you were armed with deadly weapons, to wit, a pistol and a kukri knife". On their own pleas of guilty the first two appellants were each sentenced to 3 years imprisonment and 12 strokes of the rattan and the third accused was released on bond for one year in the sum of $1,000 and to be under the supervision of the probation officer.

The facts given by the police did not show which of the three accused was armed with the deadly weapons, the pistol and the kukri.

Held: on the fact of it one of the three accused could not have been armed as there were only two weapons. The prosecution should have clarified for the complainants as to who was armed and with what and framed separate charges in respect of the persons armed with the two weapons and then consolidate the trial with that of the other charged with simple robbery.

Sentence of whipping set aside. In respect of the other accused order of binding over set aside and a sentence of 12 months' imprisonment substituted.

MAGISTRATE'S CRIMINAL APPEAL.

David Choong for the first two appellants.

Haji Suhaimi bin Dato' Haji Kamaruddin Deputy Public Prosecutor for the respondent.

Ong Hock Sim J.: This is an appeal by the first two appellants against the sentence of 3 years' imprisonment and twelve strokes of the rattan upon their conviction on their pleas of guilty by the learned president, sessions court Penang on an amended charge:—

"That you on the 15th day of February 1967 during the hours of sunset and before the hours of sunrise, to wit, at about 3.55 a.m. at the ground floor of Hotel International, Penang Road, in the District of Georgetown, in the State of Penang, jointly robbed, Chuan Nam Thong of cash $24,881.70 (Malaysian Currency), $1,212 (American currency) and $470 (Republic of Vietnam currency) and at the time of committing the robbery you were armed with deadly weapons, to wit, a pistol and a kukri knife, and you have thereby committed an offence punishable under section 392 and 397 of the Penal Code."

There is also an appeal by the learned deputy public prosecutor in respect of another accused who had been jointly charged with the two appellants and had also been convicted on the same charge on his own plea of guilty, but who was released on bond for one year in the sum of $1,000 and to be under the supervision of the probation officer under section 290 of the Criminal Procedure Code (S.S. Cap. 21) for the like period.

At the very outset, I would quote *Ratanlal's* (20th Edn.) Law of Crimes p. 1009 on section 397:—

"It does not create any substantive offence. It is complementary to sections 392 and 395, which create the substantive offences."

I now read this section:—

"If at the time of committing or attempting to commit robbery, the offender is armed with or uses any deadly weapon or causes grievous hurt to any person, such offender shall be liable to be whipped with a rattan in addition to any other punishment to which he may be liable under any other section of this Code."

Ratanlal at p. 1013 has this to say:—

"It is necessary to show that at the time of committing robbery the accused was armed with a deadly weapon and not merely that one of the robbers who was with the accused at the time carried one. The words 'offender' and 'such offender' refer only to the persons who are proved to have actually been 'armed with' deadly weapons and not to the others who in combination with such persons have committed robbery or decoity. Section 34 has no application to the construction of this section."